United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1545

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Pls

To Be Argued By
Alphonse R. Noë

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74-1545

I-291 Why? Association, on behalf of itself and its members,

Plaintiff-Appellee

v.

Joseph B. Burns, as Connecticut Commissioner of Transportation, George S. Koch, as Connecticut Deputy Commissioner of Transportation, Bureau of Highways, A. J. Siccardi, as Division Engineer for Connecticut, Federal Highway Administration, William H. White, as Regional Director of the Federal Highway Administration for the Northeastern Region and Claude Brinegar as Federal Secretary of Transportation,

Defendants-Appellants

On Appeal From The United States District Court
For The District Of Connecticut

BRIEF FOR APPELLEE

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Docket No. 74-1545

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v.

Joseph B. Burns, as Connecticut Commissioner of Transportation, et al.

Defendants-Appellants

On Appeal From The United States District Court For The District Of Connecticut

BRIEF FOR APPELLEE

STATEMENT OF ISSUES

I. WHETHER A FINAL ENVIRONMENTAL IMPACT STATEMENT FOR AN INTERSTATE HIGHWAY AUTHORED BY STATE HIGHWAY DEPARTMENT DESIGN ENGINEERS AND OFFICIALS SEEKING FEDERAL-AID FUNDS IS A STATEMENT PREPARED BY THE "RESPONSIBLE OFFICIAL" UNDER SECTION 102 (2)(c) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. § 4332 (2)(c).

II. WHETHER THE DISTRICT COURT'S CONCLUSION THAT THE FINAL ENVIRONMENTAL IMPACT STATEMENT WAS INADEQUATE IN ITS DESCRIPTION AND DISCUSSION OF ALTERNATIVES AND IN ITS CONSIDERATION OF THE POTENTIAL NOISE AND AIR QUALITY IMPACTS IS SUPPORTED BY THE UNCHALLENGED FINDINGS.

III. WHETHER LACHES SHOULD BAR A PUBLIC INTEREST LITIGANT FROM VINDICATING PUBLIC RIGHTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. § 4321 ET SEQ (NEPA) WHERE GOVERNMENT OFFICIALS CHARGED WITH COMPLIANCE WITH NEPA CONCEALED STUDIES REVEALING MORE SUBSTANTIAL AIR AND NOISE POLLUTION IMPACTS THAN WERE DISCUSSED IN THE FINAL ENVIRONMENTAL IMPACT STATEMENT AND SUIT WAS PROMPTLY FILED AFTER GAINING ACCESS TO THE DOCUMENTARY RECORD OF THOSE OFFICIALS' DECISION MAKING.

STATEMENT OF THE CASE

I. Preliminary Statement

Connecticut Department of Transportation ("CONNDOT") officials (hereinafter "state defendants") appeal from a decision of the United States District Court for the District of Connecticut (Blumenfeld, C. J.)* entered on February 7, 1974 preliminarily enjoining state defendants and various Federal Highway Administration ("FHWA") officials and the Secretary of the United States Department of Transportation (hereinafter "Federal defendants") from any further acts or expenditures for the construction of the southwest quadrant of Interstate Route 291 ("I-291") until further order of the court. This quadrant of about 7.6 miles was originally planned as only part of an entire circumferential beltway around metropolitan Hartford, Connecticut.**

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* Reported at 372 F.Supp. 223 and to be included in appellants' deferred appendix. Reference herein will be to the original paging of the record, thusly: (Op. 7) for page 7 of the District Court's opinion as filed.

** Prior to this action, in the summer of 1973, the Governor of Connecticut instructed CONNDOT to prepare transportation plans "based on an assumption" that the "controversial" northwest quadrant of the I-291 beltway will not be built (Plf's. Ex. 43). Subsequent to the District Court's decision, in May 1974, CONNDOT "traded-in" the northwest quadrant under Sec. 137 of the Federal Aid Highway Act of 1973, 23 U.S.C. § 103, for funds transfer to other interstate routes or for mass transportation purposes. Thus, a substantial link in the originally proposed beltway was cancelled.

II. Prior Proceedings Below

Plaintiff, I-291 Why? Association, an unincorporated association of persons aggrieved by plans for construction of the southwest quadrant of I-291 and organized in ad hoc response thereto, filed its Complaint on behalf of itself and its members on November 12, 1973. The Complaint sought injunctive and declaratory relief and alleged as separate causes of action defendants' breach of four Federal statutes requiring the consideration of the environmental effects of Federal actions. Neither standing nor jurisdiction were challenged. By agreement, plaintiff's motion for a preliminary injunction was limited to defendants' failure to comply with the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. § 4321, et seq. At a hearing on the motion on November 27, 28 and 30, 1973, the District Court received over sixty exhibits in evidence and heard testimony from eleven witnesses, including, in addition to both plaintiff's and defendants' transportation, noise, and air quality experts, defendants Koch and Siccardi and other CONNDOT and FHWA personnel. The preliminary injunction issued on February 7, 1974.

III. The District Court's Decision

As it relates to the appeal, the District Court's decision held with respect to three main issues as follows:

1. The delegation to the state highway department, CONNDOT, of primary responsibility for the preparation and writing of the Environmental Impact Statement (EIS) for I-291 could not be squared with this Court's construction of NEPA as requiring that the Federal agency charged with compliance with NEPA itself prepare the final EIS (Op. 49). The District Court specifically found that the final EIS, rather than being prepared by FHWA or at least resulting from a synthesis of CONNDOT's draft and FHWA's rigorous review, was written by CONNDOT and merely ratified by the FHWA (Op. 47).

2. The EIS prepared by CONNDOT for I-291 is inadequate under the procedural mandates of NEPA. It fails to meet the requirement for a thorough study and a detailed description of alternatives to the proposed highway. The EIS was found to provide only "generalities and heavy-handed self-justifications" as to those alternatives it does discuss, and to omit mention of at least two plausible alternatives, thus usurping the Secretary of Transportation's decision making role so that, based on the EIS alone, only a decision to proceed with I-291 as planned was possible (Op. 56, 57, 65). Additionally, the treatment of noise and air quality impacts in the EIS was found to be "both cursory and conclusory" (Op. 66). The District Court

refused to treat subsequent uncirculated and unreviewed noise and air quality studies as a supplemental EIS possibly curative of those defects.

3. Plaintiff was properly diligent, once affirmatively on notice that I-291 would be constructed as planned, in bringing this action especially since defendants did not make public post-EIS studies revealing that more substantial air and noise pollution impacts than were discussed in the EIS might result from I-291. The "unconscionable" delay requisite for laches was lacking since plaintiff promptly filed suit after gaining access to the documentary record of defendants' decision making (Op. 32-33). The court was not unmindful of the plaintiff's special status as a public interest litigant and the overall circumstances of the case.

In its ruling, the District Court also stated that it would entertain a motion to dissolve the injunction after trial on the merits or upon presentation to the court, after filing with the Council on Environmental Quality (CEQ), of a revised final EIS prepared in conformity with its opinion. The ninety-three page opinion, containing abundant footnotes reproducing pertinent portions of the documentary evidence and testimony relied upon, was treated by the District Court as its "findings of fact and conclusions of law, Fed. R. Civ. P. 52(a)".

IV. Prior Proceedings In This Appeal

On April 5, 1974, the state and Federal defendants filed their respective notices of appeal to this Court. Subsequently, the Federal defendants filed a voluntary motion of dismissal of their appeal, which was opposed by the state defendants. After oral argument on May 21, 1974, the Federal defendants' motion for dismissal was granted leaving the state defendants as the sole appellants herein.

Plaintiff subsequently moved to have the state defendants' appeal dismissed as moot, or alternatively, to have the appeal removed from the docket until such time as the issues involved are factually ripe for appellate review. That motion was based on the issuance, on August 15, 1974, subsequent to the appeal, of a document titled "Draft Supplement to the Previously Approved Final Environmental Impact Statement" for I-291, the project in dispute. It was plaintiff's contention that such document demonstrated the inadequacies of the original EIS. Moreover its issuance constituted an admission of, and acquiescence in, the propriety of the District Court's ruling. In a decision filed September 18, 1974, the motion to dismiss was denied without prejudice to renewal before the panel which will hear the appeal. Plaintiff herewith renews that motion.

V. Statement of Facts*

A. CONNDOT's Sole Preparation Of Both The Draft And Final Environmental Impact Statement (EIS)

On February 1, 1971, more than a year after the effective date of NEPA, the FHWA advised CONNDOT that an EIS would be required for I-291 (Op. 7).** Accordingly, personnel of CONNDOT's Bureau of Highways prepared an unresearched "rough draft" of an environmental impact statement (Op. 8, 68; Defs' Ex. F). At the time of the decision to prepare an EIS, public hearings on the project were already completed (Op. 6).

This "rough draft", which defendant Koch, then CONNDOT's Chief of Design, acknowledged was written "off the top of my head" (Tr. 337) without the support of any empirical data, was reviewed by a field employee of the Connecticut division of FHWA (Op. 8, 68).

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* Since the state defendants do not challenge the District Court's findings of fact as such, only the legal conclusions drawn therefrom, plaintiff will support its statement of facts primarily by reference to the court's findings, as have state defendants.

** The pertinent portion of the Federal statute involved, NEPA, is set forth in footnote 3 of the District Court's Opinion, pp. 2-5. The requirement of "a detailed statement by the responsible official" on the environmental impact of the proposed action appears in Section 102(2)(C) of NEPA. That the construction of I-291 is a major Federal action requiring the preparation and issuance of an EIS pursuant to the provisions of NEPA is not disputed (Aplnt's Br. 1).

A draft EIS, based on the earlier "rough draft" and the FHWA field employee's comments, was prepared under the supervision of defendant Koch. Mr. Koch testified that the resulting draft EIS was based more on his experience and knowledge of the project than on empirical data (Op. 8). This draft EIS is the one which was filed with the FHWA and circulated to other agencies (but not including the Environmental Protection Agency (EPA)) and to the public for comment (Op. 8, 9). After receipt of comments on the draft EIS, the actual writing of the final EIS was done by CONNDOT personnel, not FHWA personnel (Op. 44).

CONNDOT's preparation of the EIS was primarily the work of highway design engineers, who might well have personal interests in promoting the FHWA's approval of a highway they had already designed, and which they were understandably anxious to see constructed (Op. 47). There was no "proposed draft final" stage which would allow substantive review or editing of CONNDOT's proposed final EIS by any FHWA group other than the Connecticut division office (Op. 44, 45). Thus, although it is at the regional, not divisional level, at which the FHWA has the capability to undertake multi-disciplinary review of an EIS (Op. 46), nevertheless, the regional office received the final EIS in so final a form as to allow only complete rejection or "rubber stamp" approval (Op. 47). It was found by the District Court that the FHWA regional office's review of the final EIS was limited to approval without any alteration (Op. 46).

Thus, rather than resulting from a synthesis of CONNDOT's draft and the FHWA's rigorous review, the final EIS was written by CONNDOT and merely "ratified" by the FHWA (Op. 47).

B. Content of the Environmental Impact Statement (EIS)

The EIS was found to provide only "generalities and heavy-handed self-justifications" and to treat the decision to proceed with Federal funding of I-291 not as an impending choice to be pondered, but as a foregone conclusion to be rationalized (Op. 56).

1. Treatment of Alternatives*

The draft EIS contained only a single page section discussing alternatives to the proposed project (Op. 52). This one-page section was criticized by both the FHWA and the Connecticut Office of State Planning, yet the section on alternatives in the final EIS was found to retain many of the flaws of its predecessor (Op. 52, 53).

The final EIS considers only three alternatives to I-291 as currently proposed (Op. 53). The final EIS dismisses in a conclusory paragraph the alternative of improving existing streets (Op. 53). The alternative of abandoning plans for construction of I-291 is given even shorter shrift while the

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*The requirement for a detailed statement on "alternatives to the proposed action" appears in Sec. 102(2)(C) of NEPA (Op. 4, ftnt. 3).

need for mass transit facilities is admitted but rejected based on only two statistics of projected travel patterns along I-291 (Op. 54, 55). The District Court found that two plausible and technically feasible alternatives to I-291 as proposed were not articulated at all in the EIS. One of these alternatives, explained at the hearing by plaintiff's expert in traffic engineering and transportation planning, Robert Morris, was even suggested by CONNDOT's own Connecticut highway map. The other alternative had been earlier proposed by Federal defendant Siccardi (Op. 56-58).

2. Consideration of Noise and Air Pollution

The treatment of noise and air quality impacts in the I-291 EIS was found to be"both cursory and conclusory". Only two out of the 28 pages in the EIS deal with noise pollution, but a single paragraph with air pollution (Op. 66). The air pollution portion of the unresearched "rough draft" written "off the top" of defendant Koch's head was carried over verbatim in the draft EIS (Op. 68).

The consideration given in the EIS to the impact of I-291 on air quality consists entirely of one paragraph of four sentences (Op. 67). Noting that "No highway in itself can reduce air pollution from vehicle emissions", the paragraph finds it "within the realm of reason" that a completed system would reduce traffic in other critical pollution areas (Plf's Ex. 23, p. 16). There is a complete lack of quantitative data on air pollution

in the EIS (Op. 72) although the state of the art as to air pollution available to the authors of the EIS was not so primitive as to allow only such a superficial consideration (Op. 73).

Rather than providing data on expected traffic volume and noise generated thereby, the final EIS sums up its consideration by noting that a new character and level of sound would be introduced but concluding, without support, that such would not be "of a magnitude sufficient to be noisome to those near enough to hear it" (Plf's Ex. 23, p. 16; Op. 67).

C. The Request For And Undertaking Of Further Noise And Air Pollution Studies

On or about October 4, 1972, public notice was given by newspaper publication that the EIS would be available for inspection for thirty days thereafter (Op. 10).

On November 6, 1972, Federal defendant Siccardi granted formal design approval for I-291 (Op. 10). However, on that same day, Federal defendant Siccardi inconsistently requested CONNDOT to give "further consideration" to the noise and air quality impacts of I-291 to reflect alleged advances in noise and air quality evaluation techniques since preparation of the I-291 EIS and design study reports (Op. 10). As to this request for further study, Mr. Siccardi testified "it was done purposely on the same day" (Op. 72).

The result of defendant Siccardi's request was that CONNDOT

personnel prepared a noise impact evaluation and commissioned an air quality study by the Research Corporation of New England (TRC) (Op. 11). The resulting air quality study showed that projected 1990 traffic along I-291 would, under "worst-case" meterological and traffic conditions, cause the level of hydrocarbons in the air to exceed EPA standards at three points near the expressway (Op. 13). Moreover, the air resources were found to be almost all "committed" to highway use in many areas immediately adjacent to the highway, thus limiting land use development and commerce (Op. 86).

The resulting noise study found FHWA standards exceeded at two points with the ambient noise level increasing at 18 of the 21 receptor points studied (Op. 87, 88). These studies at least made the advisability of proceeding with I-291 a question upon which, in the light of the two studies, reasonable men could disagree (Op. 32).

D. Further Project Approvals Without Making Public The Post-EIS Noise And Air Pollution Studies

On March 6, 1973 CONNDOT transmitted the noise analysis to defendant Siccardi (Op. 11, 12). On June 8, 1973, it transmitted the air quality study to defendant Siccardi (Op. 12).

Defendants did not make public the post-EIS air and noise pollution studies, even though these studies revealed that more substantial air and noise pollution impacts than were discussed in the EIS might result from I-291 (Op. 32).

These studies were handled entirely outside of the channels established by NEPA and the FHWA's own procedures, PPM 90-1,* for processing an EIS. They were not circulated in draft form for comment by interested agencies such as the Environmental Protection Agency (EPA) nor were they ever sent for review and approval, in draft or final form, to even the regional office of the FHWA, let alone to the Washington office of the FHWA and the office of the Secretary of Transportation. Neither the public nor the President's Council on Environmental Quality (CEQ) had any knowledge of these adverse findings. The post-EIS I-291 noise and air quality studies were never regarded by the FHWA as anything but an individual initiative of Federal defendant Siccardi (Op. 75, 76).

Nevertheless, on June 14, 1973, less than one week after receiving the study showing significant air pollution far beyond anything mentioned in the EIS, Federal defendant Siccardi approved CONNDOT's "plans, specifications and estimates" (P.S. & E.) for the first two miles of I-291 from I-91 to the Newington-Wethersfield town line. In the same letter in which he approved the P.S. & E. for this project, defendant

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* Policy and Procedure Memorandum 90-1, FHWA "Guidelines for Implementing Section 102(2)(C) of the National Environmental Policy Act of 1969 [and other acts]", Aug. 24, 1971, Plf's Ex. 12.

Siccardi also authorized CONNDOT to solicit bids for the construction of the first two miles of I-291 (Op. 13). Nevertheless, it was not until October 12, 1973, that defendant Siccardi notified CONNDOT that his office was accepting "without reservation the Air Quality Study as submitted." (Op. 14)

On September 6, 1973, a contract for this construction was awarded to Arute Brothers, Inc. Arute began work under the contract on September 19, 1973. Its operations to the date of the hearing consisted only of grading, clearing and drainage work, and the construction of temporary approaches (Op. 13, 14).

ARGUMENT

I

AN ENVIRONMENTAL IMPACT STATEMENT WRITTEN BY CONNDOT AND MERELY RATIFIED BY THE FHWA IS NOT ONE PREPARED BY "THE RESPONSIBLE OFFICIAL" AS REQUIRED BY SECTION 102(2)(C) OF NEPA

The question of the propriety of state highway agency authorship of an EIS was not decided by the District Court in the abstract. Prior to holding the defendants in non-compliance with NEPA on this point, Chief Judge Blumenfeld factually found as follows:

> "Yet the regional office* received the final I-291 EIS in so final a form as to allow only complete rejection or "rubber stamp" approval. Thus, in no real sense can the final EIS be said to have undergone such searching review by the FHWA as to make the EIS the FHWA's own product. Rather than resulting from a synthesis of CONNDOT's draft and the FHWA's rigorous review, the final I-291 EIS was written by CONNDOT and merely ratified by the FHWA." (Op. 47)

After further finding that the I-291 EIS was primarily the work of highway design engineers at CONNDOT who were "understandably anxious" to see I-291 constructed, the District Court followed Greene County Planning Board v. Federal Power Commission,

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* The FHWA's own PPM 90-1 (P1f's Ex. 12), purportedly followed in justifying state highway agency preparation of the EIS, explicitly provides, in ¶6j, "FHWA review and acceptance of the final environmental statement shall be the responsibility of the Regional Federal Highway Administrator." (emphasis added)

455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972), where this Court held that the explicit statutory command of NEPA, and the strong policy considerations underlying it, require the Federal agency to prepare an EIS on major Federal actions significantly affecting the quality of the human environment. In Greene County the Federal Power Commission was found to have abdicated a significant part of its responsibility by substituting the EIS of an applicant for Federal funds for its own. Of NEPA's Section 102(2)(C), this Court said:

> "It is a mandate to consider environmental values 'at every distinctive and comprehensive stage of the [agency's] process.' The primary and non-delegable responsibility for fulfilling that function lies with the Commission." 455 F.2d at 420.

Furthermore, NEPA:

> "... explicitly requires the agency's own detailed statement 'to accompany the proposal through the existing agency review process'." 455 F.2d at 421 (emphasis in original)

Among the bases for this conclusion were:

> "[1] ... intervenors generally have limited resources ... and thus may not be able to provide an effective analysis of environmental factors ... [2] the danger of [FPC's] procedure, and its obvious shortcoming, is the potential, if not the likelihood, that the applicant's statement will be based on self-serving assumptions ... [3] Congress has compelled agencies to ... formulate their own position early in the review process ... [and 4] ... alternatives might be lost as the applicant's statement tended to produce a status quo syndrome." 455 F.2d at 420, 421.

In holding that Greene County strictly controls in Federal aid highway cases, Chief Judge Blumenfeld is not alone in this circuit.*

In Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731 (D.Conn. 1972) Judge Newman held that "[in] this case, federal officials must prepare the final version of the impact statement as required by the plain wording of NEPA." As reasons for his conclusion, Judge Newman said that "[t] his was held to be a requirement of the statute ... [and] ... the very same danger of self-serving assumptions that concerned the Court in Greene County is present here." 346 F.Supp. at 741. Judge Newman was ruling with respect to the same Connecticut Department of Transportation (CONNDOT) involved here.

In Conservation Society v. Secretary of Transportation (II), 362 F.Supp. 627 (D.Vt. 1973), appeal docketed, No. 73-2629 (2d Cir. 1973) Circuit Judge Oakes imposed the same requirements for the following reasons:

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* See also Northside Tenants' Rights Coalition v. Volpe, 346 F.Supp. 244, 248 (E. D. Wisc. 1972); Iowa Citizens for Environmental Quality v. Volpe, 487 F.2d 849, 955 (8th Cir. 1973) (Lay, J. dissenting).

> "... it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. This being true, delegation of the preparation of the EIS to the VHD raises the danger that the EIS will reflect 'self serving assumptions' and brings the case directly within Greene County." 362 F.Supp at 631

The District Court recognized two arguable distinctions between the instant case and Conservation Society (II). Noting first that the extent of communication and consultation between CONNDOT and FHWA in the present case seemed to go beyond the level of informal chats, the court nevertheless found that the FHWA was presented with the EIS so as to be in a "take it or leave it posture" (Op. 46). Noting also that the Connecticut Department of Transportation lacks the Vermont Highway Department's legislative directive to build the projects covered in the EIS the court stated:

> "But this does not mean that CONNDOT is necessarily disinterested in whether FHWA agrees to fund I-291. ... CONNDOT is just as likely to lard an EIS with self-serving assumptions as were the state highway department in Southern Vermont and the state power authority in Greene County." (Op. 47-49)

In Steubing v. Brinegar, 375 F.Supp. 1158,(W.D.N.Y. 1974), the court, citing Greene County, Conservation Society, and this case, issued a preliminary injunction on a highway project, the contract for which had been awarded 6 months before plaintiffs brought suit. The court said "[t] hat no Environmental Impact

Statement as defined by N.E.P.A. has been prepared by any federal agency is admitted. In the court's opinion, this admission is critical." 375 F.Supp. at 1165. The court in The Vermont Natural Resources Council, Inc. v. Brinegar ___F.Supp___ (D.Vt., filed Aug. 21, 1974), appeal docketed, No. 74-2168 (2d Cir. 1974), has distinguished Greene County.

Five circuits have upheld District Court opinions finding FHWA review of a state-prepared EIS in compliance with NEPA. In Movement Against Destruction v. Volpe, ___F.2d___, 4 ELR 20278 (4th Cir. 1974) the Court affirmed the final order "upon the opinion of the District Court". The District Court had found that the FHWA participated in the preparation of the EIS through frequent contacts and acted with good faith objectivity in reviewing and accepting it. 361 F.Supp 1360, 1393 (D.Md. 1973). In a per curiam decision, the Court in Finish Allatoona's Right, Inc. v. Brinegar, 484 F.2d 638 (5th Cir. 1973), in addition to commenting on plaintiffs' "shotgun" attack, noted that a comprehensive EIS was prepared with the assistance of Federal agencies.

Federal agency officials were found to have "actively participated in all phases of the EIS preparation process" in Life of The Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973)

(characterized by Chief Judge Blumenfeld as tendentiously distinguishing Greene County, apparently because it found no "abdication of responsibility"). In Citizens Environmental Council v. Volpe, 484 F. 2d 870 (10th Cir. 1973), the Court felt that the Secretary of Transportation's review and adoption of the EIS as his own was consistent with NEPA's goals. It also noted that the Secretary "did not simply 'rubber stamp' the State's work". 484 F. 2d at 873. In Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F. 2d 849, 854 (8th Cir. 1973), (Circuit Judge Lay dissenting) the Federal agency was found not to have "abdicated a significant part of its authority" where PPM 90-1 had been followed and the agency added supplemental information or detailed reports to the state's final EIS.

Thus, the foregoing cases involved situations distinguishable from the circumstances here. The District Court's finding here that "in no real sense can the final EIS be said to have undergone such searching review by the FHWA as to make the EIS the FHWA's own product" (Op. 47) suggests that it would have reached the same conclusion of noncompliance with NEPA even under the criteria applied by the other five circuits.

Nevertheless, the views of the other circuits are not persuasive, especially where the affirmance is per curiam or upon the lower court's opinion. Moreover, to the extent that

those Courts are content to abide by the regulations issued by FHWA "permitting" the state highway department to prepare the EIS (PPM 90-1, ¶ A 6b, 6i; Plf's Ex. 12) they ignore the more persuasive* guidelines of the Council on Environmental Quality (CEQ) which, while permitting the Federal agency to receive initial information from an applicant, nevertheless require that "[in] all cases the [Federal] agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of the draft and final environmental statements." 40 CFR § 1500 7(c)(1973). In addition, in Greene County, this court recognized that an independent analysis of a part of PASNY's EIS "... cannot replace a single coherent and comprehensive environmental analysis ...". 455 F.2d at 420.

Unless the FHWA independently studies and analyzes the project in light of NEPA's requirements, the cumulative effects of bias (be it inherent or not) in an applicant's evaluation may pass unchecked through any subsequent agency review process. The danger of self-serving assumptions is that they are unreviewable, by either the responsible official or by the courts, let alone the public.

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* CEQ is the agency "ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements". Warm Springs Dam Task Force v. Gribble, ___U.S.___, 41 L.Ed.2d 654, 660, 4 ELR 20666, 20669, No. A-1146, (Douglas, Circuit Justice, June 17, 1974), aff'd, ___U.S.___, 41 L.Ed.2d 1156, 4 ELR 20669, No. A-1146 (U.S. July 9, 1974).

A complete analysis of the EIS authorship issue benefits from the following persuasive argument on behalf of Greene County's per se rule of invalidation of a state-authored EIS:

> "The per se rule, if applied by all circuits, would lead to appropriate agency regulations on EIS authorship and would shift the initial burden of monitoring compliance with this aspect of NEPA to the agencies themselves, while facilitating ultimate judicial evaluation of such compliance. Since the case-by-case approach requires judicial findings in every case as to the degree of federal agency control over state authors, it tends to encourage even more NEPA litigation, while at the same time increasing the chance that a legally insufficient EIS might for lack of litigation become the basis for federal decisions made in ignorance of potentially disastrous environmental consequences." (Op. 47, footnote 72)

The practical wisdom of Chief Judge Blumenfeld's suggestion is apparent from the two appeals recently heard by this Court on September 18, 1974. In The Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, Appeal No. 73-2629, this Court must review a decision by Circuit Judge Oakes, sitting as a Vermont District Court judge, concluding that the Vermont Highway Department's legislative directive to build the project in issue was likely to result in an EIS containing applicant bias and self-serving assumptions if prepared by it. However, Judge Coffrin did not so conclude in The Vermont Natural Resources Council, Inc. v. Brinegar, Appeal No. 74-2168, although the same highway department and similar legislative direction of construction of the highway was present. While the highways

involved were different, and in the latter case the court apparently found that the FHWA's comments upon and review and adoption of the EIS constituted significant input to the EIS, the inconsistency is nevertheless apparent.

Even more apparent is the difficulty posed for public interest litigants faced with an EIS prepared by the state agency-applicant for Federal funding. On its face a state authored EIS seldom if ever reveals the degree of Federal participation in its preparation. Thus, absent costly investigation of the type conducted in pretrial discovery, the extent of the state-Federal partnership on the EIS will not be ascertained. Chief Judge Blumenfeld appreciated this in advocating a per se rule and in noting the expense of such litigation (Op. 28). This Court has also recognized the dampening effect legal fees may have on public interest litigation. Greene County, supra, 455 F.2d at 426.

Practical considerations aside, it is the Congressional mandate in NEPA which requires Federal preparation of an EIS. In United States v. Scrap, 412 U.S. 669 (1973), the Supreme Court stated with respect to NEPA's expressed purposes:

> "To implement these lofty purposes, Congress imposed a number of responsibilities upon federal agencies, most notably the requirement of producing a detailed environmental impact statement." 412 U.S. at 613 (emphasis added).

The Supreme Court also referred to Federal agencies "which have the primary responsibility for the implementation of NEPA", 412 U.S. at 494, and included a citation of Greene County, supra, in a footnote referenced to that phrase.

II

THE UNDISPUTED FACTS FOUND BY THE DISTRICT COURT COMPEL THE CONCLUSION THAT THE EIS WAS INSUFFICIENT IN DESCRIBING AND DISCUSSING ALTERNATIVES AND IN THE CONSIDERATION GIVEN TO NOISE AND AIR QUALITY IMPACTS

An assessment of whether the EIS adequately complies with the mandates of NEPA includes not only an awareness of the appropriate judicial inquiry but also the trial court's evaluation of the evidence. The findings in the District Court's ninety-three page opinion are extensive. In assessing the EIS for sufficiency in discussion of alternatives and consideration of the impact of I-291 on the air quality and sound levels of residential land adjacent the proposed expressway, the District Court had the benefit of a documentary record of administrative actions and inactions, as well as live testimony from the EIS' authors, CONNDOT and FHWA personnel and experts (on behalf of both plaintiff and defendants) in traffic engineering, noise analysis and air quality. In addition, defendants' own post-EIS studies of environmental impacts enabled comparative evaluation. The findings based thereon are not to be set aside unless clearly erroneous, Fed. R. Civ. P. 52(a), and no such assertion is advanced by state defendants.

In making an inquiry as to the adequacy of the EIS, Chief Judge Blumenfeld applied this Court's own statement of the relevant inquiry found in Monroe County Conservation Council v. Volpe, 472 F. 2d 693, 697-8 (2d Cir. 1972). As to discussion

of alternatives, he specifically noted this Court's view that:

> "The requirement for a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in § 4332(2)(D), is the linch-pin of the entire impact statement." 472 F. 2d 697-8

The District Court then found the alternatives discussed to be given short shrift and two "plausible alternatives", one explained by witness Robert L. Morris, a traffic engineer and transportation planning consultant, the other proposed by defendant Siccardi himself, to have been ignored (Op. 56). Even under a broad view of a "rule of reason" under NEPA urged by defendants, the court found these omissions to clearly constitute non-compliance with NEPA (Op. 62).

The nature of the detailed analysis required of an EIS was explored by the Court in Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109 (D.C. Cir. 1971):

> "The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2)(A) and (B). In general, all agencies must use a 'systematic, interdisciplinary approach' to environmental planning and evaluation 'in decision-making which may have an impact on man's environment.' In order to include all possible environmental factors in the decisional equation, agencies must 'identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.'" 449 F. 2d at 1113

This Court has cited Calvert Cliffs with approval in Monroe

County, supra, 472 F. 2d at 697-9. The District Court could properly find, on the evidence before it, that a cursory and conclusory treatment of air pollution in but a single paragraph out of the 28 pages in the EIS was the antithesis of a detailed "systematic interdisciplinary approach". Moreover, that single paragraph was admitted by one of the state defendants, defendant Koch, to be written "off the top of my head." (Op. 68). It was also found that the state of the art was not so primitive as to allow only such a superficial consideration and purely qualitative discussion of air pollution, especially in view of EPA air quality standards and details of measurement techniques published in the Federal Register, 36 Fed. Reg. 8186 et seq. (Op. 73). Significant also is the fact that the EPA did not have an opportunity to review the EIS (Op. 8).

In any event, "Congress directed that NEPA, which provided for an impact statement, was to be implemented to 'the fullest extent possible'". 42 U.S.C. § 4332. Monroe County, supra, 472 F. 2d at 699.

The treatment accorded noise and air quality impacts in the EIS clearly was not to "the fullest extent possible" in view of the defendants' own subsequent studies. This fact was acknowledged by Federal defendant Siccardi on the very day that he granted the design approval.

A further demonstration of those deficiencies is provided

by the "Draft Supplement To The Previously Approved Final Environmental Impact Statement" recently issued by Federal defendants and the subject of plaintiff's motion to dismiss the appeal as moot. The draft supplement states:

> "This supplement report is being authored by the Connecticut Division of FHWA calling upon its Region Environmental Task Force for expertise, advice and review. The Connecticut DOT (for noise data) and their air quality consultants, The Research Corporation of New England, Incorporated, were called upon to provide the necessary technical data for analysis by FHWA.
>
> The alternatives discussed herein are those named by Judge Blumenfeld for further comprehensive discussion.
>
> A completely revised noise analysis has been prepared as well as an entirely new air study complete with ambient air quality readings." (Plaintiff's Motion to Dismiss, p. 6)

The foregoing statement is both a recognition and an admission by the Federal defendants that more information about alternatives and environmental impacts than was ever made known to the public and other agencies can be obtained and discussed to a further extent, if only as a consequence of public interest litigation.

III

LACHES CANNOT BAR A PUBLIC INTEREST SUIT UNDER NEPA WHERE THOSE CHARGED WITH COMPLIANCE WITH NEPA CONCEAL FROM THE PUBLIC STUDIES REVEALING MORE SUBSTANTIAL AIR AND NOISE IMPACTS THAN WERE DISCUSSED IN THE FINAL ENVIRONMENTAL IMPACT STATEMENT

A. Controlling Principles Of Equity Compel Denial Of The Defense Of Laches In This Case

State defendants assert that laches is a bar to the relief awarded to the plaintiff. Specifically, they claim that plaintiff could have challenged the sufficiency of the EIS within thirty days after its "publication" on October 4, 1972.* In so arguing, state defendants overlook two important aspects, namely, the facts of changed circumstances and concealed studies and the equitable nature of the doctrine of laches, particularly significant here where a private attorney-general is litigating the public interest.

Laches is an equitable defense, the application of which is controlled by equitable considerations and "it cannot be invoked to defeat justice." R.F.C. v. Harrisons & Crosfield,

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* State defendants' own chronology of events demonstrates the fallacy of their reasoning. It shows the October 4, 1972 date relied upon being followed approximately one month later by Federal defendant Siccardi's request for further air and noise studies. After receipt of these studies, Federal defendant Siccardi granted P.S. & E. approval on June 14, 1973. Significantly, nowhere in state defendants' chronology does there appear a date on which these studies were made public.

204 F.2d 366, 370 (2d. Cir. 1953), cert. denied, 346 U.S. 855 (1953). Yet state defendants would have this Court bar the relief otherwise found proper by invoking the doctrine of laches to shield, from public vindication, the government's failure to obey its own laws enacted to protect its citizens against environment harm arising from governmental action.

Not to be overlooked in equitable considerations in assessing state defendants' claim of prejudice rising to a level for invocation of laches is their apparent contempt for the NEPA process and purpose. In spite of the District Court's finding that "The EIS treats the crucial decision to proceed with federal funding of I-291 not as an impending choice to be pondered, but as a foregone conclusion to be rationalized," (Op. 56) state defendants assert in their brief:

> "This prejudice is not outweighed by any public considerations since the provisions sought to be enforced by NEPA compliance are procedural and upon full compliance will not result in abandonment of the project but will cause costly delay in construction." (Applnt's Br. 17, emphasis added)

Not only does this attitude assume the conclusion that the highway will be built irrespective of the outcome of proper environmental studies but it forces one to question what the state defendants deem to be proper "public considerations" if those of NEPA are not to be included. State defendants here are the same defendants admonished by Judge Newman in Committee to Stop

Route 7 v. Volpe, 346 F.Supp. 731 (D.Conn. 1972) as follows:

> "When defendants ask me to weigh the possibility of increased cost of construction if these projects are delayed, they are assuming that the projects will be built, and that the preparation of an impact statement will have no effect whatever on the decision whether or not to build. I cannot accept that assumption, nor should it be put forth by those who have the obligation under this Act to make a good faith decision about the projects after, not before, preparing and considering an impact statement." 346 F.Supp. at 738.

The District Court correctly appreciated plaintiff's special status as a public interest litigant seeking to vindicate public rights under NEPA. Unlawful administrative conduct involving the failure to follow the mandates of Federal laws designed to reveal environmental impacts cannot be insulated from judicial correction through tardiness of the citizenry in raising the facts of non-compliance with the law. This is especially so where, as here, the officials keep from the public post-EIS studies revealing more adverse environmental impact than is disclosed in the EIS. Such conduct is the very antithesis of that "continuing responsibility" required by Section 101 of NEPA, 42 U.S.C. § 4331.

In City of New York v. United States, 337 F.Supp. 150 (E.D.N.Y. 1972) a Three-Judge District Court, speaking through Chief Circuit Judge Friendly, noted the newness of NEPA and

the time that it would take to fully comprehend its import, adding that "... protestants compounded an already difficult situation by waiting until the eleventh hour to raise an important question which would best have been considered from the outset." 337 F.Supp. at 159.

However, then the Court pointed out:

> "On the other hand, such considerations do not justify the Commission's disregard of the law. The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary responsibility under the Act rests with the agency." 337 F.Supp. at 160.

Thus, the Court remanded the action to the agency, the Interstate Commerce Commission, to supplement the record on the environmental issue and assess whether its order permitting abandonment of a railroad should be revised, while permitting the Commission's order to stand for the short period required for such supplementation. In so doing, the Court again noted that the plaintiffs exacerbated the problem by waiting until after the hearings before the Commission were completed to raise the environmental question. Nevertheless, the Court again pointed out with respect thereto:

> "... none of this can ultimately insulate unlawful administrative conduct from judicial correction ..." 337 F.Supp. at 164.

In Greene County, (I) supra, this Court enjoined construction of some power transmission lines while declining to reopen authorization proceedings before the administrative agency and to halt construction of two other lines far advanced. The petitioners had made timely motions to intervene before the agency, the Federal Power Commission, but offered no objection to construction of the two lines and did not petition the Court for review within the time limit set for reviews from the Federal Power Commission under the Federal Power Act. Nevertheless, this Court felt it necessary to observe:

> "Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA, ..." 455 F.2d at 425

It is submitted that the existence of potential for subversion of NEPA here has been demonstrated.

B. The Existence Of Laches Is Dependant Upon The Overall Factual Circumstances Of The Case

The existence of laches is a question primarily addressed to the discretion of the trial court. Czaplicki v. The Hoegh Silver Cloud, 351 U.S. 525, 534 (1956); Burnett v. New York Cent. R., 380 U.S. 424, 435 (1965). In evaluating the specific facts herein, Chief Judge Blumenfeld noted:

> "As was stated in the very case on which defendants principally rely for their argument in favor of invoking laches:

> "'Laches is not merely a question of time; it is a question of diligence as well. [Citation omitted.] There is no certain period of time within which a plaintiff may reasonably delay before filing suit; that 'reasonable' period varies upon the circumstances of each case ... [¶] Laches is an equitable doctrine and will be applied where it would be inequitable to permit plaintiffs to proceed." Clark v. Volpe, supra, 342 F.Supp. at 1328." (Op. 24)

Chief Judge Blumenfeld then carefully considered the chronology put forth by defendants and concluded that, in view of all the circumstances of the case, the asserted delay in bringing suit was not so unreasonable, nor it consequences so unconscionable, as to constitute laches as a bar to relief (Op. 34). Significant among the facts considered was the defendants' failure to make public or provide to other governmental bodies the post-EIS studies, even though those studies revealed that more substantial air and noise impacts than were discussed in the EIS might result from I-291. Ironically, state defendants seek to use their own concealment of these studies to their advantage on the issue of laches by urging that "plaintiff became aware of the air and noise studies after retaining counsel" (Applnt's Br. 16).*

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* The court stated that these studies "apparently" did not become known until after counsel's inspection of CONNDOT's files (Op. 32). Although a reading of ¶¶ 34-36 of Plf's Ex. 50 may not necessarily provide full justification for such a conclusion, the significant point is that defendants do not controvert the fact that these studies were kept off the public record, as found below.

C. State Defendants Have Not Demonstrated Prejudicial Delay Rising to the Level of Laches

Although state defendants now allege prejudice to the "public interest, public welfare and the interests of third parties" (Aplnt's Br. 17), the prejudice alleged and proved below was solely economic and other aspects of public interest (including NEPA) were ignored (Op. 18). Furthermore, the District Court found that "only a fraction" of the costs incurred could have been avoided by a prompter suit (Op. 19). Nevertheless, the District Court properly recognized that a dollar price tag alone is insufficient to excuse potential damage to the environment arising from a failure to adequately evaluate a project's impact thereon when one notes that it is the declared policy of the United States to protect and preserve the national environment "to the fullest extent possible". Section 102 of NEPA, 42 U.S.C. § 4332

In this recognition the District Court correctly followed the decision in Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972), involving the application of NEPA to an ongoing interstate highway project known as Arlington I-66. A location public hearing on the highway had been held in 1958 and location approval given in June 1959. The Court noted that the project had been given extensive newspaper coverage; the selected route had been shown in the local county land use plan since 1961; the county had relied upon a proposed route in its

zoning, traffic and utilities location planning; and numerous businesses had been located near the proposed route. Right of way acquisitions amounting to over $28,000,000 were essentially complete and the Commonwealth of Virginia had expended $1,500,000 in preliminary engineering which would not be reimbursed by the Federal government. In the words of the Court:

> "In short, most planning and preliminary work has been done. Most of what remains to be done is actual construction, which has scarcely begun..." 458 F. 2d at 1328.

The defendants there also claimed that the suit should be barred by laches and the Court noted that the Federal and state defendants

> "...as representatives of the general public and specific interest groups will be prejudiced by appellants' delay in bringing suit if the proposed route for Arlington I-66 is altered or abandoned. ... Appellants could have brought suit earlier to minimize or avoid this harm;...."

Irrespective, the Court stated:

> "Nevertheless, we decline to invoke laches against appellants because of the public interest status accorded ecology preservation by the Congress. We believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would certainly outweigh the benefits that might accrue therefrom to the general public."
> 458 F. 2d at 1329, 1330.

Thus, the Court focused upon the construction remaining to be completed and the possible harm that such would give rise to as compared to the environmental benefits flowing from stopping the project until proper environmental impact evaluations could be made. In an earlier case that same Court aptly noted that "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section [Section 102 of NEPA] of its fundamental importance". Calvert Cliffs, supra, 449 F. 2d at 1115.

State defendants' attempt at distinguishing Arlington Coalition on the basis that no EIS was there involved must fail in the face of the District Court's finding as to insufficiency and inadequacy, legally and factually, of the EIS here involved. To the contrary, it is not unreasonable to assume that an EIS with latent defects such as the present EIS would more likely result in misleading the public into reliance thereon with the comsequence that no legal action would be initiated. Had Federal defendant Siccardi publicly requested further noise and air pollution studies, and then made those studies public, state defendants' argument would perhaps be appropriate.

State defendants would limit a party's right to urge noncompliance with NEPA where an EIS is involved to the thirty day period following publication of the EIS. The District

Court properly noted that various Federal approvals in the administrative process have differing significance in terms of irrevocably committing the FHWA to funding the highway. The court found that such commitment did not exist here until June 14, 1973, the date of P.S. & E. approval, a view supported by Monroe County, supra, 472 F. 2d at 699. In noting that there must be some sort of Federal action or inaction, beyond the mere publishing of the EIS, before a prospective plaintiff can be sure that the project will not be modified or cancelled and will go forward as planned, the District Court was applying the same rationale applied by this Court in Greene County (II), 490 F. 2d 256 (2nd Cir. 1973):

> "Despite the protracted procedural sparring, there can be no final appealable order until some decision has been handed down by the administrative hearing officer and/or the FPC. At that time the adequacies or deficiencies of the EIS or all other matters relative to a decision on the merits can be argued. There will scarcely be an EIS filed which will not appear to some party to be deficient according to his point of view. If appeals were to be countenanced at the behest of every party who might find the statement deficient in certain respects, appeals would be unending and to little avail. Until a final decision has been rendered, there is nothing to review." 490 F. 2d at 258.

D. The District Court Applied the Correct Concepts of Laches to This NEPA Situation

The majority of courts facing an issue of laches in actions involving NEPA have found both the strong public interest on the side of ecology preservation and the need for assurance that Federal agencies and officials will comply with the mandates of Federal statutes to outweigh competing considerations founded on delay and prejudice to governmental defendants.

Even minimizing the foregoing policy considerations, evaluations of traditional criteria utilized in determining whether the defense of laches is applicable results in denial of state defendants' position. As noted in Ward v. Ackroyd, 344 F. Supp. 1202 (D. Md. 1972), also a NEPA Highway case,

> "To sustain the defense of laches, proof of prejudice to the party asserting the defense together with an unconscionable delay by the party against whom the defense is asserted is required. Costello v. United States, 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961). An unconscionable delay can occur only after a party discovers or by the exercise of reasonable diligence could have discovered the wrong of which he complains." 344 F. Supp. at 1212.

As in Ward, supra, there is no evidence here that plaintiff knowingly sat on its rights and delayed bringing suit. See also Environmental Defense Fund v. Tennessee Valley Authority, 468 F. 2d 1164, 1182 (6th Cir. 1972) and National Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 368 (E.D.N.C. 1972).

The Court in Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F. Supp. 918 (D. Pa. 1971), followed an approach similar to that taken by the District Court and considered various factors as being important on the laches issue, namely the dates of the award of the contract, the beginning of construction, and the institution of suit. There, under those factors, the delay was not considered unreasonable and although prejudice to defendants existed it was not found controlling. The contractor was found to have a remedy against the state for his monetary loss and the court took note of the fact that the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe 401 U.S. 402 (1971) considered the equities of a somewhat similar situation and did not hesitate to halt construction work by the contractor at the time of oral argument of the case.

Penn Mutual Life Ins. Co. v. Austin, 168 U.S. 685 (1898) cited by state defendants in an attempt to provide a "public work" exception to the usual considerations of laches is distinguishable on its facts. There the Court had found that the plaintiff stood by and watched the work proceed while having full opportunity to prevent its accomplishment. Moreover, "There was nothing clandestine in the conduct of the municipality since its action was dependent upon a

municipal election." 168 U.S. at 699. Nor was the Federal government's violation of its own laws involved. For plaintiff here to have had earlier opportunity would have required that it have at its disposal the scientific expertise to carry out studies of the type such as the post-EIS air quality and noise studies to become fully aware of the environmental risks.

This Court recognized the limited resources and likely inability to provide an effective analysis of environmental factors in Greene County (I), supra, 455 F. 2d 412, 420 (2d. Cir. 1972). Moreover, plaintiff had a right to presume, in the absence of evidence to the contrary, that public officials would properly fulfill their statutory obligation under NEPA. Clark v. Volpe, 342 F. Supp. 1324, 1328-29 (E.D. La. 1972).

CONCLUSION

For the reasons set forth above, plaintiff respectfully submits that the District Court correctly found the authorship of the EIS to be in noncompliance with NEPA because of the lack of meaningful FHWA participation therein. Moreover, the facts found by the District Court with respect to insufficiency of discussion and consideration of alternatives and noise and air quality impacts are not clearly erroneous and support the legal conclusion of inadequacy of the EIS. Plaintiff further submits that the facts as found by the District Court compel the conclusion that laches does not apply in this case because of the public interest status of the plaintiff, the fact that defendants concealed the evidence of noncompliance with NEPA and plaintiff did not knowingly sit on its rights to the unreasonable prejudice of defendants.

Accordingly, the decision of the District Court should be affirmed.

October 16, 1974

Respectfully submitted,

Haynes N. Johnson

Alphonse R. Noë

Attorneys For Appellee
I-291 Why? Association

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74-1545

I-291 Why? Association, on behalf of itself and its members,

Plaintiff-Appellee

v.

Joseph B. Burns, as Connecticut Commissioner of Transportation, et al

Defendants-Appellants

ADDENDUM TO BRIEF FOR APPELLEE

This is to inform the Court that plaintiff-appellee, I-291 Why? Association, further relies on two decisions of this Court rendered since the filing of its brief. Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974) supports plaintiff's Argument Point I on EIS authorship while Steubing v. Brinegar, Nos. 74-1911 and 74-2162 (2d Cir., decided February 13, 1975) supports plaintiff's Argument Point III that laches can not bar this public interest suit.

Respectfully submitted,

April 22, 1975

Alphonse R. Noë
Attorney For I-291 Why? Association

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Addendum was sent via U. S. mail, postage prepaid, to appellants' attorney at his address of record herein.

Alphonse R. Noë

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74-1545

I-291 Why? Association, on behalf of itself and its members,

Plaintiff-Appellee

v.

Joseph B. Burns, as Connecticut Commissioner of Transportation, et al.

Defendants-Appellants

On Appeal From The United States District Court For The District Of Connecticut

BRIEF FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that on October 16, 1974 I served two copies of the "Brief on Behalf of Appellee" on the appellants by sending two copies thereof to their counsel Clement J. Kichuk, first class postage pre-paid, at his address of record herein.

Alphonse R. Noë